

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SANTHONY THIGPEN,

Plaintiff,

v.

ORDER
11-CV-466A

COUNTY OF ERIE, et al.,

Defendants.

The above-referenced case was referred to Magistrate Judge Hugh B. Scott pursuant to 28 U.S.C. § 636(b)(1) for pretrial proceedings. Magistrate Judge Scott issued a Report and Recommendation, Dkt. No. 43, in which he recommended that summary judgment be granted in defendants' favor pursuant to Fed. R. Civ. P. 56 on the ground that injuries suffered by plaintiff were not severe enough to be of Constitutional dimension.

The Court has carefully reviewed the Report and Recommendation, the objections, responses and all the relevant pleadings, and upon *de novo* review it is hereby

ORDERED, pursuant to 28 U.S.C. § 636(b)(1), the Report and Recommendation, Dkt. No. 43, is not adopted. Because material questions of fact remain whether force was applied maliciously to plaintiff to cause harms, *see e.g.*, *Vazquez v. Curcione*, 11-CV-443 (HBS) 2013 WL 5408858 *4 (W.D.N.Y. Sept. 25, 2013) (*citing Wright v. Goord*, 554 F.3d. 255, 268-69 (2d Cir. 2009)), whether plaintiff's alleged injuries were *de minimus* is therefore not amendable to summary judgment

pursuant to Fed. R. Civ. P. 56. The action is recommitted to Magistrate Judge Scott pursuant to the terms of the Court's prior referral.

IT IS SO ORDERED.

Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: March 27, 2014